

# PŘÍSPĚVKY ZE ZAHRANIČÍ

## Fundamental Rights in Austrian Civil Law

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### I. Sources of law and methodological approach

In Austria, there are several sources of fundamental rights<sup>1</sup>. First, they are based in national law. There are several constitutional laws providing fundamental rights, such as the “*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*” (Basic law on the general legal rights of citizens) from 1867<sup>2</sup> and the “*Bundesverfassungsgesetz über den Schutz der persönlichen Freiheit*” (Constitutional law on the protection of personal freedom) from 1988<sup>3</sup>. Second, Austria is a member state of the European Convention on Human Rights, which in the hierarchy of legal norms also has the same level as the constitution<sup>4</sup>.

From the historical perspective, fundamental rights were defensive instruments for the citizens against state intervention. Their objective was to create an area of protection for every single person, which is immune

against interference by authorities, thus providing a major precondition for the free development of the individual.

Since fundamental rights are based on the relationship between the individual person and the state, it does not go without saying that they have the same effect between two private persons. Nevertheless, the free development of the individual may be affected by legal relations between private persons as well. This is why the idea of fundamental rights is of significant relevance for private law too.

Based on German doctrine, there has been a discussion in Austrian jurisprudence as to how far and in what way fundamental rights should be relevant for private law. There were two main schools of thought. One held that fundamental rights should be applied directly in private law relationships (*unmittelbare Drittwirkung der Grundrechte*)<sup>5</sup>. As a consequence, for example, the principle of equal treatment should be applied in contract law as well as in public law. But it can be objected that fundamental rights in private law relations just cannot work the same way as they do between a private person and the state. There is a very simple reason: Fundamental rights are intended, as has already been mentioned, to protect the individual against the state, whereas the state does not have fundamental rights. In private law relations two persons are involved and both of them have fundamental rights. Protecting the fundamental rights of one party will often mean restricting the fundamental rights of the

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<sup>1</sup> See *Stelzer*, Die Entwicklung der Grundrechte und ihr Einfluss auf die Textierung von Grundrechtsdokumenten, ZÖR 54, 1999, 3; *Stelzer*, Die Quellen der Grundrechte, ZÖR 54, 1999, 9.

<sup>2</sup> RGBI 1867/142.

<sup>3</sup> BGBl 1988/684.

<sup>4</sup> EMRK BGBl 1958/210; see *Frowein/Peukert*, Europäische Menschenrechtskonvention – EMRK-Kommentar (2009). Also cf *Berger*, Auswirkungen der Europäischen Menschenrechtskonvention auf das österreichische Zivilrecht, JBl 1985, 142; *Ermacora/Nowak/Tretter* (Hrsg), Die Europäische Menschenrechtskonvention in der Rechtsprechung der österreichischen Höchstgerichte (1983), and *Gusy*, Wirkungen der Europäischen Menschenrechtskonvention und der europäischen Rechtsprechung in einzelnen Vertragsstaaten, ZfRV 1989, 1.

<sup>5</sup> Cf *Griller*, Drittwirkung und Fiskalgeltung von Grundrechten, ZfV 1983, 1, 109; *Griller*, Der Schutz der Grundrechte vor Verletzungen durch Private, JBl 1992, 205, 289; *Hager*, Grundrechte im Privatrecht, JZ 1994, 373; *Leisner*, Grundrechte und Privatrecht (1960); *Nipperdey*, Grundrechte und Privatrecht (1961).

other party. Therefore, one has to find a balance between the rights of both parties.

This is why nowadays the theory calling for direct application of fundamental rights in private law relations is not supported any more. An exception would only be accepted if the law as such provided for the direct application of a fundamental right in relation to another person. An example in Austrian law is the fundamental right of data protection, which by law is effective against state authorities basically the same way as it is effective against any other person<sup>6</sup>.

The majority of authors and the Supreme Court share the idea that fundamental rights are only indirectly effective in private law relations (*mittelbare Drittwirkung der Grundrechte*)<sup>7</sup>. This has a double consequence: First, legislation in the field of private law has to take fundamental rights into account. Hence, a legal norm in the field of private law may be unconstitutional because it affects the fundamental rights of a person. Second, and more importantly, the fundamental rights have to be taken into account when it comes to the interpretation of private law provisions. This is especially true for the interpretation of general clauses, such as the *bona mores*.

The extension of the relevance of fundamental rights to private law relations is not as surprising as it might seem. One should bear in mind that fundamental rights always have had a private law counterpart: the so called “personal rights” (*Persönlichkeitsrechte*)<sup>8</sup>, the objective of which is to protect a person and his property against interference and damage caused by other persons. It is against the law to kill or to injure another person and if someone does so he has to face the legal consequences, which in private law means that he has to pay for the damage. If someone publicly accuses another person of a criminal act which the other person

has not committed, then he will have to compensate the damage.

Art. 16 of the Civil Code plays an important role in the development of the protection of the person in Austria. It has the following wording: “Every human being has rights, acquired by birth and obvious by reason, and therefore is to be considered a person.” This article is based on the original text of the Civil Code which was promulgated in 1811 and has never been amended since. When this article was drafted at the beginning of the 19th century it was supposed to be a clear commitment to the ideas of natural law and the philosophy of *Immanuel Kant*. However, in the decades thereafter the practical relevance of Art. 16 was close to zero. The provision was considered to reflect a programmatic idea without the possibility of direct application. Only in the second half of the 20th century was Art. 16 rediscovered by doctrine and courts. Now it is common opinion that Art. 16 is a gateway for fundamental rights into private law<sup>9</sup>. It can be concluded today that Art. 16 has developed into an important source of law for a comprehensive protection of personality.

## II. Cases

So much for the theory. Let us now turn to some examples from Austrian courts and from the European Court of Human Rights.

### 1. Presumption of paternity

The first case<sup>10</sup> deals with the presumption of paternity. If a married woman gives birth to a child, it is assumed that the husband is the father of the child. In the old law this presumption could only be contested by the husband and, in special cases, by the public prosecutor. The child was not allowed to do so. Based on the practice of the European Court of Human Rights, the Austrian Constitutional Court held that the protection of the family, as provided in Art. 8 of the European Convention on Human Rights, is not restricted to relations resulting from marriage. Other aspects have to be taken into account, such as the cohabitation of a couple, the duration of their relation or the existence of children of the couple. If family ties in that respect actually exist then the state must provide a legal framework which allows the integration of a child into the family. A close factual relationship between the husband of the mother and the child might justify not allowing the biological

<sup>6</sup> See *Walter/Mayer/Kuckso-Stadlmayer*, Bundesverfassungsrecht, 10<sup>th</sup> ed. (2007) n. 1336.

<sup>7</sup> See *Bydlinski*, Thesen zur Drittwirkung von Grundrechten im Privatrecht, in *Rack*, Grundrechtsreform (1985) 173; *Bydlinski*, Bemerkungen über Grundrechte und Privatrecht, ZÖR 12, 1963, 423; *Dürig*, Grundrechte und Zivilrechtsprechung, in *FS Nawiasky* (1956) 157; *Griss*, Die Grundrechte in der zivilrechtlichen Rechtsprechung, in *Österreichische Juristenkommission* (Hrsg), Aktuelle Fragen des Grundrechtsschutzes (2005) 54; *Hinteregger*, Die Bedeutung der Grundrechte für das Privatrecht, ÖJZ 1999, 741; *Mayer*, Der “Rechtserzeugungszusammenhang” und die sogenannte “Drittwirkung” der Grundrechte, JBl 1990,768; *Mayer*, Nochmals zur sogenannten “Drittwirkung” der Grundrechte, JBl 1992, 768.

<sup>8</sup> Cf *Adler*, Die Persönlichkeitsrechte im allgemeinen bürgerlichen Gesetzbuch, in *FS zur Jahrhundertfeier des ABGB II* (1911) 163; *Canaris*, Grundprobleme des privatrechtlichen Persönlichkeitsschutzes, JBl 1991, 205; *Edlbacher*, Der Stand der Persönlichkeitsrechte in Österreich, ÖJZ 1983, 423; *Frick*, Persönlichkeitsrechte (1991); *Zeiler*, Persönlichkeitsschutz (1998).

<sup>9</sup> See *Bydlinski*, ZÖR 12, 454ff; *Marhold*, Kommentar zu OGH 24. 10. 1978, 4 Ob 91/78, ZAS 1979, 177; *Reischauer*, OGH 24. 10. 1978, 4 Ob 91/78, DRdA 1979, 394 (395ff).

<sup>10</sup> Austrian Constitutional Court 28. 6. 2003, G 78/00.

father to have his paternity determined by courts as this would intrude into the family life of the child, his mother and her husband. On the other hand, if there is no factual relationship between the child and the husband of the mother being the legal father, and if factual relations do exist between the child, the mother and the biological father, then Art. 8 of the European Convention on Human Rights provides for a right of the child to have the paternity of the biological father determined by courts, thus declaring him the father in the legal sense. The provisions in the Austrian Civil Code which did not provide such a right were considered to be unconstitutional.

## 2. *Same sex partnership and tenancy law*

The second example<sup>11</sup> deals with the interpretation of a legal norm in tenancy law. As in many other countries, the tenant of an apartment is protected by law in various ways. Art. 14 of the Tenancy Act provides that after the death of the tenant, the surviving spouse and some close relatives are entitled to continue the contract if they have lived in the apartment before and have a special need for the apartment because of the lack of alternatives. It is not relevant whether they are the legal successors of the deceased. The right to continue the contract is also granted to the surviving partner of an unmarried couple. In a certain case, the surviving partner of a homosexual couple claimed the right to continue the tenancy after the death of his partner. The Austrian Supreme Court held that Art. 14 of the Tenancy Act had to be interpreted in such a way that only the surviving partner of a heterosexual couple was allowed to continue the contract. The European Court of Human Rights did not share this view. In its ruling, the court held that the protection of the family, as laid down in Art. 8 of the European Convention on Human Rights, might be held to constitute a grave and legitimate reason to justify differences in the treatment of homosexual partners. But since the Austrian government could not find a convincing argument for why the exclusion of a homosexual partner from the continuation of the tenancy would be required to protect families, the restrictive interpretation of Art. 14 of the Tenancy Act could not be brought in line with Art. 8 and Art. 14 of the European Convention on Human Rights.

## 3. *Criticizing a politician*

There are many cases dealing with the conflict between the freedom of expression and information as provided in Art. 10 of the European Convention on Human Rights and the right to privacy and good repu-

tation. Most of these cases, at least in Austria, deal with the conflict between mass media and politicians. In Austria's largest newspaper, an influential politician, who was a deputy to the parliament, was criticized for not having abandoned his private law firm when entering into politics. In this article he was accused of having initiated an amendment of a law in favor of one of his clients who, incidentally, was a fierce competitor of the owner of the large newspaper which criticized him. Austrian courts imposed an injunction against that newspaper because the good reputation of the politician in question was affected<sup>12</sup>. The newspaper relied on Art. 10 of the European Convention on Human Rights. The European Court of Human Rights held that the reputation of a politician generally deserves protection. On the other hand, a politician acting as a public person has to accept the interest of the public in open discussion of political questions. The press plays an essential role for society as a "public watchdog". The court distinguished between a statement of facts which has to be true and mere value-judgments which are an expression of free opinion but have to be based on facts to a sufficient extent. Based on that distinction, the Court held that the critical commentary in the newspaper was justified by Art. 10 of the European Convention on Human Rights. The facts reported were generally true. Based on these facts, the value-judgment that the politician would not act in accordance with moral standards which apply in all democracies was not excessive<sup>13</sup>.

## 4. *Private investigation with a hidden video camera*

The next case<sup>14</sup> is a fine example for the way in which Art. 16 of the Civil Code opens the way into private law for fundamental rights. Two parties took a conflict to court. Part of the dispute was the local competence of the court because one party (A) denied living in a particular house as was claimed by the other party (B). Consequently, party B hired a private detective to find out if party A actually lived in this house, which belonged to A's mother. The private detective recommended monitoring the house with a hidden video camera which was placed in a car just opposite the entrance of that house. For nearly two months, with some interruptions, the video camera recorded every person entering or leaving the house. Then party A and his mother sued party B and the detective for an infringement of their personal rights. The Austrian Supreme Court held that a systematic, hidden monitoring by

<sup>11</sup> ECHR 24. 7. 2003, – *Karner*.

<sup>12</sup> Austrian Supreme Court, 9. 3. 1995, 6 Ob 1007/95.

<sup>13</sup> ECHR 26. 2. 2002, ÖJZ 2002/18.

<sup>14</sup> Austrian Supreme Court, 19. 12. 2005, 8 Ob 108/05y, ÖJZ 2006/67.

means of a video camera and identifying the persons recorded generally is an infringement of the right to privacy as protected by Art. 8 of the European Convention on Human Rights, the relevance of which in the relation between the two parties is based on Art. 16 of the Civil Code. The Court conceded that a stronger interest of the other party might justify the infringement of the personal right. But the infringement would be justified only if the monitoring with a video camera was an appropriate way to collect the information this other party needed and if the monitoring with the video camera was the least harmful way to affect the personal right. The Supreme Court held that the monitoring with a video camera was not the least harmful way because the private detective could have monitored the house himself or he could have sent one of his employees to do so and they could have taken pictures to find out if party A entered or left the house. This way of monitoring would have been less harmful than the use of a camera operating permanently because every person entering or leaving was recorded and the recordings are permanent.

### 5. *The testament of a nobleman*

The last example comes once again from the Austrian Supreme Court<sup>15</sup>. Unfortunately the ruling is very short, so we do not have precise information about the facts of the case. The issue was that a member of a noble family prepared a will which distinguished between noble and non-noble descendants. After the death of the first successor, only descendants from a noble marriage should be the next successors. The Supreme Court held that the exclusion of non-noble successors would not comply with Art. 7 of the Austrian Constitution which provides the principle of equal treatment. In my opinion, this argument is not convincing. It means nothing less than the direct effectiveness

of fundamental rights in private law, which doctrine and court practice generally refuse to accept. There is no principle of equal treatment in the law of succession. By preparing a will, a person may distribute his assets in case of his death just as he prefers. Close relatives may wish to participate in the estate of the deceased person. Their legitimate interest is protected by the compulsory shares which are provided by Austrian law and all the other jurisdictions in continental Europe. The existence of compulsory shares may also serve as an argument that there are no other restrictions when it comes to the preparation of a will. In a similar case dealing with the family of the former German emperor, the German Constitutional Court did not see any conflict with the principle of equal treatment<sup>16</sup>. But the Court held that the right to enter into a marriage might be affected if only such descendants who lived in a marriage with a member of the nobility of equal rank could be the legal successor. However, this case is different from the one decided by the Austrian Supreme Court because in the Austrian case it was not relevant if the chosen successors *lived* in a noble marriage; they were required to be descendants of such a marriage. Hence, the freedom to enter into a marriage is not affected the same way in the Austrian case as it was in the German case.

### **III. Conclusion**

It could be shown that fundamental rights play a vital role in private law. Generally, they are not applied directly, but they have to be taken into account when it comes to the interpretation of provisions governing the private law relations between two persons. Art. 16 of the Civil Code serves as a gateway for the influence of fundamental rights in private law.

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<sup>15</sup> Austrian Supreme Court, 8. 9. 2004, 7 Ob 193/04i.

<sup>16</sup> German Constitutional Court, 22. 3. 2004, 1 BvR 2248/01.